



INDIANA UTILITY REGULATORY COMMISSION
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IN THE MATTER OF THE INDIANA)
UTILITY REGULATORY COMMISSION'S)
INVESTIGATION OF MATTERS)
RELATED TO COMPETITION IN THE)
TELECOMMUNICATIONS INDUSTRY IN)
THE STATE OF INDIANA PURSUANT TO)
IND. CODE 8-1-2 et seq.)

CAUSE NO. 42530

FILED

MAY 23 2005

INDIANA UTILITY
REGULATORY COMMISSION

You are hereby notified that on this date the Indiana Utility Regulatory Commission ("Commission") has caused the following entry to be made:

On January 28, 2005, Time Warner Telecom of Indiana, L.P. ("Time Warner") filed a *Request for Administrative Notice*. On February 21, 2005, Indiana Bell Telephone Company, Incorporated ("SBC Indiana") filed its *Response in Opposition to Time Warner Telecom of Indiana, L.P.'s Request for Administrative Notice*. On March 15, 2005, Time Warner filed its *Reply to SBC Indiana's Objection to Administrative Notice Request*.

Time Warner's Request asks the Commission to take administrative notice of the following documents and orders on file with the Commission:

1. IURC Cause Number 42236: All testimony admitted into evidence at the evidentiary hearing; the transcript of the evidentiary hearing; all proposed orders filed; and the final order issued by the Commission on September 29, 2004; and
2. IURC Cause Number 42218: All testimony admitted into evidence at the evidentiary hearing; the transcript of the evidentiary hearing; and all proposed orders filed.

SBC opposes said request in that it exceeds the scope of 170 IAC 1-1.1-21 (j)-(n) and states that "not all facts may be administratively noticed." First, Rule 21(j) states an administratively noticed fact must be relevant. In addition, it must be one not subject to reasonable dispute and is either: (1) generally known within the territorial jurisdiction of the Commission; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Ind. Rule of Evidence Rule 201. Furthermore, the Commission's power to admit administratively noticed documents into the record is limited by due process requirements, which require the Commission to afford the parties an opportunity to cross-examine witnesses, inspect documents or exhibits, and to offer evidence in explanation or rebuttal. For support of this contention, SBC cites *Monon R.R. v. Public Serv. Comm'n*, 170 N.E.2d 441, 442 (1960) (quoting

Public Serv. Comm'n v. Indiana Bell Tel. Co., 130 N.E. 2d 467 (1956). Further, SBC states Time Warner's Request does not explain the purpose for which Time Warner seeks administrative notice and Time Warner should not be permitted to re-litigate the matters at issue or decided in Cause Nos. 42236 and 42218. SBC also argues that the testimony, hearing, transcript and proposed orders contain disputed facts, opinions of witnesses and arguments of counsel and therefore are not facts that are not subject to reasonable dispute. SBC also argues the Commission has previously declined to take administrative notice of testimony and exhibits from a separate proceeding on the grounds that such documents are not self-proving. In *Petition of Wabash County REMC*, Cause No. 39551 (IURC 3/31/93), the Office of Utility Consumer Counselor ("OUCC") requested the bench to take administrative notice of certain testimony and exhibits prepared in another proceeding. The Commission sustained the objection and found that "matters that may not be judicially noticed may not be administratively noticed." *Id.* At 9. "In this case, the OUCC seeks to use in this proceeding matters which are not self-proving and which would be the potential subject of cross-examination by opposing counsel. Therefore, we conclude that the testimony and exhibits which the OUCC requests the Commission take administrative notice of are not the proper subject of administrative notice and that Petitioner's objection should again be sustained." *Id.*

SBC also argues that Time Warner's Request is procedurally flawed because it does not attempt to show that the cited materials are relevant to this case as required by the Commission's rules. SBC argues that the materials are not relevant to this case in that Cause No. 42236 was a complaint proceeding brought by Time Warner against SBC Indiana wherein Time Warner alleged that a particular customer specific contract ("CSO") did not comply with the price floor requirements in the alternative regulatory plan approved by the Commission in Cause Nos. 40785-S1, 40849 and 41058, commonly referred to as the "OI 2000 Plan." Further, the complaint docketed as Cause No. 42218, filed by Time Warner and two other companies, concerned whether SBC Indiana's winback promotions complied with the OI 2000 Plan. SBC states that the OI 2000 Plan is no longer in effect and further, the evidence focused on the compliance issues before the Commission in those proceedings and the record in those cases was developed based on the facts and state of competition as it existed three or more years ago. SBC states that since that time the state of competition, technological advancement and the regulatory framework have all changed and thus, testimony and transcripts from the prior cases are stale and not relevant here. Similarly, the proposed orders are neither probative nor relevant evidence as these documents set forth argument of counsel and focused on the issues before the Commission, not on the generic matters being explored in this investigation.

Finally, SBC argues that as recognized by the Commission in *Petition of Wabash County REMC*, the prefiled testimony and transcript from other proceedings are matters which would be the potential subject of discovery and cross-examination. Yet, those witnesses are not available in this case and as a result, the admission of this evidence into the record here would violate the parties' right to due process as there is no opportunity for the parties to challenge the statements of these witnesses or test their accuracy. Additionally, the Commission is prevented from observing the demeanor or otherwise establishing the veracity of the statements made by these individuals. SBC argues that the information contained in Time Warner's request would unnecessarily burden the record here, the evidence is stale, not limited to the issues before the Commission in this case and the witnesses are not available for cross-examination.

Time Warner states that its purpose for seeking administrative notice is clear from the prefiled testimony filed contemporaneously with its Request, the Request is consistent with the requirements of Indiana Rule of Evidence 201, the Request seeks administrative notice of information that is directly at issue in this proceeding, the parties and the Commission have already had an opportunity to propound discovery upon, cross-examine, and observe the witnesses whose testimony is the subject of the Request, and the Request seeks administrative notice of information that is not stale and that is necessary for the Commission's full consideration of the issues presented in this proceeding.

Time Warner states that nowhere in the IURC's administrative rules is there any requirement that a party state its reason for requesting administrative notice and even if this were a requirement, pages 11-15 of witness Sherwood's pre-filed testimony contains numerous references to the information for which administrative notice is requested, including references to the testimony of various witnesses in Cause Nos. 42218 and 42236 and to the proposed Orders filed in those causes. Next, with regard to SBC's contention that the documents for which administrative notice is sought are not "self-proving" because they contain conflicting viewpoints, Time Warner states that this argument may be valid if it had limited its request to only the testimony or arguments presented by one of the parties. However, Time Warner seeks administrative notice of the entirety of the pre-filed testimony, the transcripts, and the proposed orders filed by all parties in this proceeding. Further, the Commission's administrative rules are explicitly and intentionally broader than Indiana Rules of Evidence 201 and that the Commission's administrative rules allow the Commission to take administrative notice of "relevant administrative rules, commission orders, or other documents previously filed with the commission" in addition to taking notice of facts that must be judicially noticed by a court. 170 IAC 1-1.1-21(i)(j). Also contrary to SBC's claim, there is Commission precedent for administratively noticing the entire record of past IURC proceedings and Time Warner gave examples of those cases.

Time Warner also states that although SBC claims that the materials are not relevant to this case, the Commission specifically noted that the issues raised in Cause No. 42236 would be revisited in this proceeding. In this proceeding, the Commission is investigating among other issues, whether and the extent to which there need to be guidelines for winbacks, promotions, and customer specific offerings and as such any evidence that aids the Commission in determining the existence and scope of such guidelines is relevant. Similarly in Cause No. 42218 there was extensive testimony on winback offers and the guidelines that should govern them. Time Warner states the testimony, transcript and proposed orders from the two causes are instructive in this case for at least two reasons: (1) they provide examples of disputes involving actual CSO contracts and actual winback offers; and (2) they provide in in-depth perspective from both the CLEC and ILEC perspective on the general policy issues that are presented by both issues.

Time Warner also addresses SBC's argument that it is deprived of its due process rights by stating that SBC propounded extensive discovery on the testimony and extensively cross-examined the witnesses and since SBC's cross-examination is included in the materials, the Commission will have the benefit of SBC's perspective. Most importantly, Time Warner states the administratively noticed materials are not being produced to prove or disprove the specific complaints raised in those causes but rather, are being offered to show examples of past CSO and winback complaints, including SBC's responses to those complaints, and to provide the Commission with the testimony on the policy questions attendant to winbacks and CSOs.

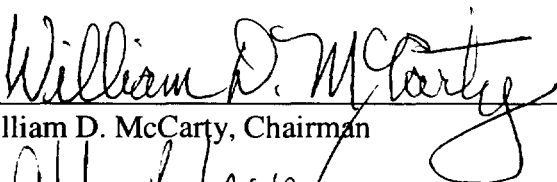
Finally, Time Warner states that its request will not, as SBC contends, require the parties or the Commission to sort through voluminous material to prepare responsive testimony and legal argument demonstrating why and the extent to which this material is stale, irrelevant or otherwise should be rejected. Time Warner states that if the request is granted, SBC need not present evidence refuting the details of the various winback offerings or the specific CSO offering that was the subject of Cause Nos. 42218 and 42236 because SBC has already done so, and SBC's evidence is included in the requested material. Therefore, Time Warner requests that the Commission grant its Request for Administrative Notice in its entirety.

The Presiding Officers, being sufficiently advised in the premises, now find that Time Warner's Request should be granted. The evidence presented in the two cause numbers is directly related to the issues the Commission chose to address in this investigation. In our Order in Cause No. 42236 dated September 29, 2004, the Commission specifically noted that the issues raised would be revisited in this Cause:

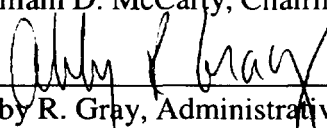
Despite what we find to be an appropriate resolution to this particular Cause, we are concerned, on a going-forward basis, with a number of the general issues that have been raised in this proceeding, and the effect these issues have on competition. In that regard, on October 29, 2003, in cause No. 42530, this Commission opened an investigation "to consider developing appropriate regulatory guidelines for the telecommunications industry including, but not necessarily limited to, CSOs. promotions, bundling, winbacks, and waiting periods in conjunction with line loss notification." Therefore, many of the same issues that were considered in this complaint case will be revisited in our investigation in Cause No. 42530." *Order at 22.*

Therefore, the Commission clearly contemplated that the issues in that cause would be addressed herein and therefore are relevant to this proceeding. Further we find SBC's argument on due process must also fail. There certainly have been times in the past when the Commission denied request to take administrative notice because the preparer of the document was unavailable for cross-examination. However, by taking administrative notice of the testimony and the entire transcript as well as the proposed orders from those causes, we cure any due process defect SBC may allege. Further, we find that granting the Request lends itself to judicial economy in that the parties and the Commission do not need to rehear testimony and cross-examination that has already been presented in prior proceedings on particular winback and CSO offers. We also find that SBC is not prejudiced by granting this request.

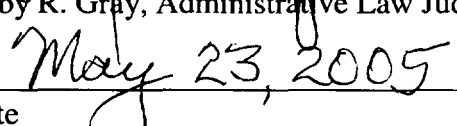
IT IS SO ORDERED.



William D. McCarty, Chairman



Abby R. Gray, Administrative Law Judge



Date